

Message Text

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ACTION IO-14

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ALOECD

E.O. 11652: N/A
TAGS: EGEN, ECOSC, EINV
SUBJECT: MARCH 27-28 SESSIONS OF IGWG ON CODE OF
CONDUCT RELATING TO TRANSNATIONAL CORPORATIONS (TNC'S).

REF: A) USUN 1117, B) USUN 1116, C) USUN 1100

1. SUMMARY: SECOND WEEK OF IGWG OPENED WITH SIGNIFI-
CANT CHANGE IN LEVEL OF G-77 COORDINATION AND PARTICI-
PATION. G-77 NOW BEGINNING TO TAKE A LESS CONCILIATORY
LINE ON SUBSTANCE, AND HAVE FOUGHT A NUMBER OF PRO-
CEDURAL SKIRMISHES, INCLUDING SOUTHERN AFRICA ISSUE.
IN PARTICULAR, G-77 INTERVENTIONS HAVE BEGUN TO FOCUS
ONDETAILED REDRAFTING OF SECRETARIAT COMMON FORMU-
LATIONS IN NEW WORKING PAPER 1 (WP 1, LDX'D TO DEPT
ON SATURDAY). AFTER SLOW START, OECD DELS NOW HAVE
BEGUN TO TAKE ACTIVE ROLE, UNDERLINING THEIR UNDER-
STANDING THAT GROUP HAS NOT YET REACHED PHASE OF
DRAFTING ACTUAL TEXT OF CODE ARTICLES, AND BASING
INTERVENTIONS ON PREVIOUS UNDERSTANDINGS REGARDING
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SEQUENCE OF GROUP'S WORK AND SUBSTANCE. EAST EUROPEANS
HAVE STEPPED UP PARTICIPATION TO CRITICIZE WP 1,
ISSUING WRITTEN STATEMENT, BUT IT IS STILL UNCLEAR
WHETHER THIS IS ONLY FOR RECORD. GROUP BEGAN WP 1
WITH SECTION III (A) COMMON ELEMENTS, AND BY COB
TUESDAY COMPLETED TEXT THROUGH PARA 41. NIKLASSON
RAISED QUESTION OF FUTURE IGWG MEETING, WHICH WILL BE

SET FOR NY OR GENEVA IN FALL DEPENDING ON SCHEDULING
CONFLICTS. END SUMMARY

2. MEETING OPENED WITH AGREEMENT ON A NUMBER OF PROCEDURAL POINTS. PACE FOR DISCUSSION OF WP 1 WILL BE MORE RELAXED THAN PREVIOUS WEEK'S AND WP 1 WILL REMAIN ON TABLE FOR NEXT IGWG MEETING. TIMING OF FURTHER SECRETARIAT REVISION ON CHAIRMAN PAPER WAS LEFT OPEN-ENDED. GROUP CONCURRED IN FOCUSING DISCUSSION ON COMMON ELEMENTS TENTATIVELY FORMULATED IN WP 1, AND ADOPTED SEQUENCE FOR REVIEW OF PAPER ESTABLISHED IN FEBRUARY MEETING FOR CHAIRMAN'S OUTLINE: III(A); IV(A); III(B) AND (C); IV(B) AND (C). US AND FRG DELS REITERATED STATUS OF TEXT IN WP 1 AND 2, AS DESCRIBED BY SECRETARIAT IN COVER NOTE TO WP 1. AS FIRST SIGN OF OVERHAUL OF G-77 TACTICS, JAMAICAN SPOKESMAN TOOK ON ACTIVE ROLE AND REQUESTED TIME FOR REGIONAL MEETINGS ON EACH MORNING OF SESSION THIS WEEK.

3. INITIAL SURPRISE CAME WITH RECOMMENDATION FROM CHAIR, AT G-77 INSISTENCE, THAT GROUP BEGIN WORK WITH WP 1, RATHER THAN PREAMBLE AND OBJECTIVES IN WP 2. REASONS FOR POSTPONEMENT OF DISCUSSION OF WP 2 UNCLEAR, BUT APPEAR TO REFLECT G-77 DIFFICULTY WITH POSITIVE SECRETARIAT HANDLING OF TONE, BALANCE, AND NON-DISCRIMINATION ISSUE, AND NIEO AND CERDS REFERENCES LIMITED OFFICIAL USE

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IN TEXT.

4. NATIONAL SOVEREIGNTY (PARAS 2 AND 3 OF WP 1): NEGATIVE TONE OF DISCUSSION OF THIS DIFFICULT SUBJECT WAS SET WITH FIRST G-77 INTERVENTIONS, WHICH REVERTED TO STRICT CALVO VIEW ON EXCLUSIVITY OF NATIONAL REGULATION OF TNE'S AND THE INADMISSIBILITY OF ANY LIMITATION ON THE "INALIENABLE" NATURE OF FULL, PERMANENT SOVEREIGNTY, EITHER HERE OR IN SECTION IV. PARA 4 WAS VIEWED AS MINIMUM FORMULATION. G-77 THROUGH JAMAICAN INSISTED ON INCLUSION OF "ECONOMIC ACTIVITIES" IN PARA 4 ON PERMANENT SOVEREIGNTY, AND SUGGESTED TNE'S SHOULD BE "SUBJECT TO" RATHER THAN "RESPECT" SOVEREIGNTY IN BOTH PARAS. USDEL INTERVENTION NOTED CIEC HANDLING OF SOVEREIGNTY ISSUE, AND STRESSED PARA 4 UNACCEPTABLE WITHOUT ADEQUATE REFERENCE TO INTERNATIONAL LAW. SPECIFICS OF NATIONALIZATION, DISPUTE SETTLEMENT AND OTHER QUALIFICATIONS IN US REDRAFT OF SECTION III(A) WERE REVIEWED, BUT WE AGREED THESE MATTERS WOULD BE APPROPRIATELY PLACED IN SECTION IV. INDIAN DEL STATED THESE SECTION IV LINKAGES HAD BEEN CLEARLY PUT, BUT WERE "UNACCEPT-

ABLE". LIMITED OECD DEL COMMENTS SUPPORTED US VIEW.
FRENCH AND CANADIAN DELS NOTED THAT ADDITION OF TERRI-
TORIAL LIMITATION ON FULL PERMANENT SOVEREIGNTY OVER
RESOURCES, WEALTH AND ECONOMIC ACTIVITIES WOULD OVER-
COME THEIR EXTRATERRITORIALITY CONCERNS, AND MAKE
FORMULA ACCEPTABLE WITH AN INTERNATIONAL LAW REFERENCE.
USDEL DID NOT COMMIT ITSELF ON THIS POINT, BUT EXPRESSED
WILLINGNESS TO CONSIDER SUCH A TEXT.

5. MENTION BY US AND OTHER OECD DEL LINKAGES TO
SECTION IV ISSUES PROMPTED SKIRMISH OVER HANDLING OF
CROSS-REFERENCES. NIKLASSON, WITH US SUPPORT, STRESSED

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THAT A FINAL CODE WOULD NOT CONTAIN CROSS-REFERENCES,
WHICH WERE MERELY AN ANNOTATIONAL CONVENIENCE AT THIS
STAGE, AND WOULD BE SINGLE, INTEGRATED WHOLE, WITH
ALL PARTS ON EQUAL FOOTING. DUTCH DEL SUGGESTED
THIS INTERPRETRATIVE PRINCIPLE BE PLACED IN PREAMBLE
WHICH US SECONDED. WHILE GROUP AGREED THAT DELS COULD
CONTINUE TO NOTE LINKAGES WHERE APPROPRIATE, DIS-
CUSSION PROMPTED SOVIET, WITH UKRAINE AND GDR SUPPORT,
TO NOTE THAT EASTERN EUROPEAN BLOC DID NOT ACCEPT
SECTION IV PER SE. THEY HAVE CIRCULATED A PAPER
(CONFERENCE ROOM PAPER 3, BEING POUCHED DEPT) OBJECTING
TO SECRETARIAT WP, CLEARLY DISPUTING THE PREMISES
FUNDAMENTAL TO ANY COMPROMISE CODE: BALANCE AND IN-
CLUSION OF EXPECTATIONS OF GOVERNMENTS IN THE TREATMENT.

THEIR PROTESTATIONS HOWEVER DO NOT SEEM TO HAVE PRACTICAL SIGNIFICANCE FOR IMMEDIATE WORK OF GROUP.

6. OBSERVANCE OF LAWS AND REGULATIONS (PARAS 7 AND 8): DISCUSSION WAS LIMITED, REFLECTED GENERAL SUPPORT OF FORMULATIONS. USDEL QUESTIONED WORD "SUPERVISE" IN LIMITED OFFICIAL USE

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PARA 8, ELICITING SECRETARIAT EXPLANATION THAT WORD "MONITOR" WOULD BE MORE APPROPRIATE. UGANDAN WANTED "SHOULD" CHANGED TO "SHALLS"; NIKLASSON WAS FIRM THAT "SHOULD" OUGHT TO REMAIN IN TEXTS, BUT WERE NOT DETERMINATIVE ON FINAL WORDING.

7. ADHERENCE TO ECONOMIC AND DEVELOPMENT GOALS (PARAS 17-20): G-77 THROUGH JAMAICAN SUGGESTED A NUMBER OF SPECIFIC TEXTUAL CHANGES TO EMPHASIZE IDEA OF THE OBLIGATIONS IN THIS AREA. G-77 ALSO CRITICIZED ANY QUALIFICATION BASED ON "SOUND COMMERCIAL PRACTICE" (SCP), AND SUGGESTED THAT PARA 20 AND OTHER ANNOTATIONS CONTAINED A CONDESCENDING EQUATION OF HOST GOVERNMENTS WITH THE'S. OECD DELS ATTEMPTED TO EXPLAIN SCP REFERENCE IN TERMS OF COMMERCIAL VIABILITY, AND MADE APPROPRIATE SECTION IV LINKAGES.

8. G-77 AMENDMENT PROPOSALS FOR PARAS 3 AND 4 HAD PROMPTED NIKLASSON, WITH US SUPPORT, TO WARN GROUP ABOUT TOO DETAILED DRAFTING AT THIS STAGE. FURTHER SPECIFIC DRAFTING POINTS RAISED BY G-77 IN THIS DISCUSSION PROMPTED COORDINATED OECD DEL INTERVENTIONS NOTING LACK OF INSTRUCTIONS TO BEGIN DRAFTING OF TEXTS ON ACTUAL CODE ARTICLES. NIKLASSON MADE STRONG STATEMENT RECALLING UNDERSTANDING OF NOVEMBER HEADS OF DEL MEETING THAT GROUP WOULD FORMULATE CODE IN SEVERAL STEPS. HE FORESAW YET ANOTHER PAPER RESULTING FROM REVIEW OF WP 1 COMING CLOSER TO FINAL FORMULATIONS, ON WHICH A DRAFTING SESSION WOULD BE BASED. G-77 SEEM TO HAVE ACCEDED TO THIS RULING, AND GROUP'S DISCUSSIONS ON TUESDAY AFTERNOON MOVED PERCEPTIBLY BACK TOWARDS SUBSTANTIVE, "PRE-DRAFTING" TRACK.

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9. RESPECT FOR CONTRACTS AND RENEGOTIABILITY (PARA 26): USDEL TOOK LEAD, WITH GOOD OECD SUPPORT, IN OBJECTING

THAT FORMULATION WAS NOT THE CLEAR STATEMENT OF RESPECT FOR CONTRACTS, WITH SUBORDINATE EXCEPTIONS, WE REQUIRED. NOR WAS LINKAGE NOTED BY COMMENTARY IN PARA 27 REFLECTED BY INCLUSION OF A PARA ON CONTRACTS IN SECTION IV. USDEL STRESSED THIS SUBJECT WAS KEY INDICATOR TO THOSE TO WHOM CODE ADDRESSED REGARDING CLIMATE FOR INVESTMENT. OTHER OECD DEL INTERVENTIONS QUESTIONED SPECIFIC DRAFTING OF PARA 26, INCLUDING CONCEPTS OF CONTRACTS "FREELY ENTERED INTO" AND EXCEPTIONS BASED ON "CLEAR INEQUALITY" AND "EXCESSIVE PROFITS". UK AND FRENCH DELS MADE REFERENCE TO SIMILAR ISSUES RAISED IN VIENNA CONVENTION ON LAW OF TREATIES AND RECENT VIENNA CONFERENCE ON STATE SUCCESSION, AND UKDEL NOTED FORMULA SHOULD RECOGNIZE RIGHT OF TNE AS WELL AS GOVERNMENTS TO SEEK CHANGES.

10. JAMAICAN FOR G-77 PROPOSED EXTENSIVE REDRAFTING OF PARA ELIMINATING LANGUAGE ON RESPECT OF CONTRACTS ALTOGETHER, ON THEORY THERE WAS NO DISPUTE ABOUT BASIC PROTECTION OF CONTRACTS AFFORDED BY NATIONAL LAWS. REFERENCES TO "FAIRNESS" AND "APPLICABLE LEGAL PRINCIPLES ETC." WERE LIKEWISE DELETED IN G-77 FORMULA BECAUSE OF CONDESCENDING NATURE AND DEROGATION FROM AMPLITUDE OF LOCAL LAW. G-77 WOULD EXPRESSLY INDICATE EXAMPLES OF RENEGOTIATION AS ILLUSTRATIVE ONLY.

11. G-77 WERE AT PAINS IN RESPONSE TO OECD DEL CRITICISMS TO STRESS GENERAL AGREEMENT ON RESPECT OF CONTRACTS BUT CONTINUED TO ASSERT SPECIFIC MENTION OF SO BASIC A RULE WAS UNNECESSARY. NIKLASSON IN HIS SUMMARY DISMISSED THIS POSITION, STATING THIS PRINCIPLE MUST BE

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REFLECTED IN PARA 26 FORMULA. G-77 ALSO REVERTED TO PREVIOUS THEME ON THIS TOPIC THAT CONCERN WAS SOLELY WITH EXISTING CONTRACTS WITH UNEQUAL, COLONIAL ORIGINS, AND GROUP WENT AROUND THIS ISSUE ONCE AGAIN. NIKLASSON URGED GROUP TO CONSIDER EXPANSION OF CIRCUMSTANCES JUSTIFYING RENEGOTIATION, AND OBJECTED TO G-77 IMPRECISE REDRAFTING WHICH WOULD LEAVE SUCH CIRCUMSTANCES OPEN-ENDED, AGREEING WITH US VIEW ON IMPORTANCE OF THIS POINT IN TERMS OF PUBLIC AND BUSINESS COMMUNITY IMPRESSIONS. HE SUPPORTED OECD VIEW ON NEED FOR SOME REFERENCE TO INTERNATIONAL LEGAL PRINCIPLES. TNC CENTER LEGAL ADVISER ASANTE, CALLED ON BY NIKLASSON, ALSO STRESSED GROUP'S OPPORTUNITY TO MAKE THE CIRCUMSTANCES OF RENEGOTIATION MORE PREDICTABLE.

12. ADHERENCE TO SOCIO-CULTURAL OBJECTIVES
(PARA 30): LIMITED DISCUSSION SAW G-77 URGING STRONGER LANGUAGE THAN "RESPECT" (SIGNIFICANTLY PERHAPS NO LONGER OFFERING A SPECIFIC SUGGESTION), AND QUERYING DEFINITION OF A "MAJOR DISTORTION. SWEDISH DEL FOUND LIMITED OFFICIAL USE

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TEXT IMPROVED SINCE IT NO LONGER LIMITED SCOPE TO HOST COUNTRIES ALONE, AND USDEL ALSO COMMENTED ON IMPROVEMENT, NOTING DEFINITIONAL VAGUENESS THROUGHOUT PARA, AND AS IN PREVIOUS MEETING, RELEVANCE OF DISTINCTION BETWEEN CONDITIONS OF ESTABLISHMENT OF TNE'S AND ANTICIPATION OF THEIR LIKELY EFFECTS, AND SUBSEQUENT OPERATIONS.

13. RESPECT FOR HUMAN RIGHTS (PARAS 32 AND 33):
THESE TWO ANNOTATIONS GENERATED LITTLE COMMENT. FRENCH DEL SUGGESTED PARA 33 SHOULD REFER TO DISCRIMINATION BASED ON LANGUAGE, AND G-77 SUGGESTED THAT PAAA SHOULD IMPOSE CLEAR PROHIBITION ON TNE'S ENGAGING IN SUCH PRACTICES.

14. TNE NON-COLLABORATION WITH RACIST REGIMES
(PARA 34): KENYAN, JOINED BY OTHER AFRICAN DELS AND GROUP D CALLED INTO QUESTION DECISION OF GROUP TO DEFER DISCUSSION OF PARA 34 ON TNE NON-COLLABORATION WITH RACIST REGIMES IN SOUTHERN AFRICA. KENYAN, REFERRING TO PAST WORK ON SUBJECT BY TNC COMMISSION AND RELEVANT UNGA RESOLUTIONS, FELT DELAY COULD NOT BE JUSTIFIED. IN AGREEING, ZAMBIAN NOTED FIRM LEGAL

BASIS FOR SANCTIONS AGAINST SOUTHERN RHODESIA AT A MINIMUM, AND GHANAIAI SAW DEFERRAL AS MERE DELAYING TACTIC WHICH WAS BEING EMPLOYED IN A NUMBER OF FORA. NIKLASSON AGAIN TOOK LEAD IN BLUNTING THIS QUESTIONING OF GROUP PROCEDURE, AND RECALLED BOTH DECISION TO DEFER DISCUSSION AND UPCOMING TNC COMMISSION DELIBERATIONS ON SOUTHERN AFRICA QUESTIONS. GDR MADE FIRST HELPFUL CONTRIBUTION BY SUGGESTING THAT ISSUE MIGHT BE DEFERRED, BUT ONLY IF GROUP COMMITTED ITSELF TO DISCUSSION OF THIS TOPIC AT ITS NEXT SESSION IN THE LIMITED OFFICIAL USE

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AUTUMN. WITH INDIAN DEL SUPPORT, NIKLASSON SO RULED.

15. NON-INTERFERENCE IN POLITICAL AFFAIRS (PARAS 37 AND 41): USDEL TOOK LEAD IN BRIEF DISCUSSION OF THESE PARAS, NOTING GENERAL ACCEPTABILITY. KEYISSUE FOR US WAS CLARITY OF LAWS AND POLICIES SETTING OUT PROHIBITIONS. INCLUSION OF WORD "PARTICULARLY" BEFORE EXAMPLES OF INTERFERENCE IN PARA 37 UNDERMINED DEFINITIONAL CONTENT OF WHAT FOLLOWED. THE ANCHORING OF OBLIGATIONS IN LOCAL LAW OR POLICY ATTEMPTED IN PARA 41 WAS TERMED ESSENTIAL BUT US QUESTIONED AMBIGUITY OF REFERENCE TO "ESTABLISHED PRACTICE". OTHERS GENERALLY FOUND PARA 42 AGREEABLE AS DRAFTED. FRENCH DEL RAISED RECOGNITION OF PROPRIETY OF NORMAL CONTACTS BETWEEN TNE'S AND GOVERNMENTS, AND SUGGESTED ORDER OF TWO PARAS BE REVERSED, WHICH GROUP CONCURRED IN. NIKLASSON AGREED WITH US CONCERNS ON PARA 37, AND SUGGESTED DROPPING WORD "PARTICULARLY". GROUP BRIEFLY FOCUSED ON PARA 38 REGARDING NATIONAL LIBERATION MOVEMENTS, PROPOSED BY BENIN DEL WHO WAS ABSENT FROM MEETING; IT SEEMED CLEAR G-77 WERE NOT SERIOUS ABOUT FOLLOWING IT UP, BUT DISCUSSON WAS DEFERRED UNTIL BENINESE REAPPEAR.

16. NEXT GROUP MEETING: IN LIGHT OF NEED TO CORRESPOND WITH ECOSOC PRESIDENT, NIKLASSON PRESSED GROUP FOR DECISION TUESDAY ON ANOTHER MEETING THIS YEAR. GROUP FOCUSED ON ALTERNATIVES OF SEPTEMBER 4-15, AND AUGUST 21-SEPTEMBER 2 IN NEW YORK, BUT SOME G-77 NY MISSIONS WERE NOT FULLY ON BOARD WITH THESE DATES BECAUSE OF CONFLICTS. GROUP DECIDED THAT NIKLASSON SHOULD INDICATE ITS DESIRE TO MEET AGAIN THIS FALL, PREFERABLY ON THOSE DATES IN NY. IN VIEW OF LACK OF NY FACILITIES AFTER MID-SEPTEMBER, A MEETING THEREAFTER COULD BE ACCOMMODATED ONLY IN GENEVA (ALTHOUGH NIKLASSON TOLD US PRIVATELY THAT HE IS OPPOSED TO GENEVA SESSIONS LIMITED OFFICIAL USE

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BECAUSE OF DIFFICULTIES WITH ADEQUATE G-77

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REPRESENTATION, MOST OF WHICH IS BASED IN NEW YORK).

ECOSOC SCHEDULING MEETING TO DECIDE DATE OF IGWG MEETING

AND VENUE OF MAY TNC COMMISSION MEETING, NOW LIKELY TO

MEET IN VIENNA, WILL BE HELD IN MID-APRIL. LEONARD

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